



## Agenda Commentary

**Item Title/ Subject:** Severn Trent – Proposal & Agreement for Phase 1.

**Staff Source:** City Manager, Steve Hewitt

**Date:** May 2, 2014

### **Item/Subject Summary / Recommendation:**

Council has had an opportunity to review the Severn Trent Team Proposal (Oklahoma Water Service Co., Burns & McDonnell, Flintco, CAS Contractors), as well as visit with the team one-on-one. Timing is everything... Our departure of our engineering team (PEC) opened up this opportunity. The growing concern is that we need to find a clear path and move forward swiftly to resolve all water concerns. This proposal is that "solution".

We already know that the Private Sector is more efficient, effective, and faster when it comes to projects and process. This is a holistic review of our needs and opportunity to provide a solid solution without taking any steps backwards.

This is the "Dream Team"... This is the team that can finance, build, design, discover, and resolve the issues NOW. The current process of: 1. finding an Engineer, 2. Reviewing Options - once again, 2. Budget estimate, 3. Design, 4. Permitting, 5. Competitive Bidding (no selection on contractors), 6. Review the financial number, 7. Creating a funding mechanism, 8. Potential construction of facility/infrastructure, and 9. Change Orders/ Time Delays, etc. (Process takes 36-48 months)

This Severn Trent proposal eliminates the cumbersome bureaucratic process. This allows for this "Dream Team" to bring back a "True" Solution and get this moving and can have a firm \$\$ financial number not to exceed at the beginning. That's important; no change orders, and firm schedule. They have stated this can be completed approximately 18 months.

This should be our direction.... **One Solution, Firm Set Price, is a No Brainer. Approving Phase One can provide you the "Exact Solution" and "Cost" within 90-120 days.** Private/Public Partnerships are the future for more efficiency. Government can get the needs completed through the efforts and strengths of the Private Sector. If Council wishes to continue the traditional Selection, Design, Bid, VE, Finance, Award, and Construct, you can do so. 10 Engineers have submitted their RFQs.

I strongly believe we need to resolve this issue. Regain the confidence in our community and send a resounding message that water issues will be resolved in approximately 18 months. Approve Phase 1 and we can see our solution, costs, and firm timeline schedule for Phase 2.

## **DRAFT: SUBJECT TO CONTRACT**

This Consulting Agreement is made and entered into as of this \_\_\_\_\_ day of May 2014, by and between the Clinton Public Works Authority, an Oklahoma Public Trust organized and existing under and by virtue of the laws of the State of Oklahoma, ("CPWA"); and Severn Trent Environmental Services, Inc., ("Consultant"). (CPWA and Consultant are referred to individually as a "Party" and collectively as the "Parties.")

### **BACKGROUND**

- A) The Parties entered into an operation and maintenance agreement dated 1<sup>st</sup> July 2010 (the "O&M Agreement") which was subsequently amended on 3<sup>rd</sup> July 2012.
- B) The CPWA wishes to ensure the long term sustainability of water supply to its customers in the face of declining water levels at its Foss Reservoir and Clinton Lake in spite of conservation measures having been taken during the last several years.
- C) The Consultant has a proposal, in conjunction with several partners in the fields of engineering, construction and financing to provide the CPWA with a new water treatment facility ("Team Members").
- D) The CPWA wishes to engage the Consultant on the basis of the terms set out in this Agreement to deliver Phase I of the proposal, namely, to define the technical approach to developing an adequate water supply and the costs of development and treatment of the water supply.
- E) Phase II would be to develop and treat the water supply identified in Phase I and enter into a long term contact to operate and maintain water treatment facilities and sell treated water to the City of Clinton.
- F) The Parties agree that this agreement is an agreement for Professional Services and, as such, is not subject Title 60 Okla Stat §176 *et. seq.*, or the Public Competitive Bidding Act of 1974 (61 Okla Stat §§102 – 138).

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

#### **1. Scope of Professional Services.**

The Consultant shall define the technical approach to developing an adequate water supply and the costs of development and treatment of the water supply by providing the Professional Services set out in Schedule 1 of this Agreement (the "Services"). Nothing in this Agreement shall commit the parties to continue with Phase II following completion of Phase I. Satisfactory resolution of Phase I issues, in the sole opinion of CPWA, is a condition precedent to the initiation of Phase II.

#### **2. Representations and Warranties.**

2.1 The CPWA represents and warrants to the Consultant that:

- i) it has the full right, power and authority to enter into this Agreement for Professional Services and to perform its obligations hereunder;
- ii) the execution of this Agreement by its representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate action;
- iii) it shall provide the Consultant with any co-operation and assistance which the Consultant reasonably requires to deliver the Services.

2.2 The Consultant represents and warrants to the CPWA that:

- i) it has the right to enter into this Agreement and to perform fully all of the obligations for Professional Services in this Agreement;
- ii) it has and each of its selected Team Members has the required skill, experience and qualifications to perform the Services;
- iii) it shall perform and shall procure that each of its Team Members shall perform the Services in a professional and workmanlike manner in accordance with generally recognized industry standards for similar services and shall devote sufficient resources to ensure that the Services are performed in a timely and reliable manner.

### **3. Fees.**

The Consultant shall provide the Services for the Fees set out in Schedule 2 of this Agreement. If the CPWA decides to proceed with Phase II, it shall have the option to roll the Fees for Phase I into the cost of Phase II. In the event that the CPWA decides not to proceed with Phase II, it shall pay the Consultant the Fees within 30 days of receipt of Consultant's invoice.

### **4. Non-solicitation.**

Each party agrees that during the Term of this Agreement and for a period of 6 months following the termination or expiration of this Agreement, it shall not make any solicitation to employ the other party's personnel without written consent of the other party (to be given or withheld in its sole discretion. For the purposes of this Section 4, a general advertisement or notice of a job listing or opening or other similar general publication of a job search or availability to fill employment positions, including on the internet, shall not be construed as a solicitation or inducement, and the hiring of any such employees or independent contractor who freely responds thereto shall not be a breach of this Section.

### **5. Termination and Effect of Termination.**

Either party may terminate this Agreement on written notice if the other party:

- i) commits a material breach this Agreement, and such breach is incapable of cure, or with respect to a material breach which is capable of being cured, if it is not cured within ten (10) days after receipt of written notice of such breach;
- ii) becomes insolvent or admits its inability to pay its debts generally as they become due;
- iii) becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency law; is dissolved or liquidated or takes any corporate action for such purpose; makes a general assignment for the benefit of creditors; or has a receiver, trustee, custodian or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

In the event of termination for whatever reason the obligations of the Parties set forth in Section 6 shall continue until the fifth (5th) anniversary of the date of termination of this Agreement.

Upon termination of this Agreement, Consultant shall be reimbursed for all properly submitted invoices for payment for Services rendered by Consultant up to and including the effective date of termination.

**6. Confidential Information.**

6.1 Where a Party receives the other Party's or a Team Member's Confidential Information (the "Receiving Party") it agrees:

- a) not to disclose or otherwise make available Confidential Information of the party whose information is received (the "Disclosing Party") to any third party without the prior written consent of the Disclosing Party; *provided, however*, that the Receiving Party may disclose the Confidential Information of the Disclosing Party to its officers, employees, consultants and legal advisors who have a "need to know", who have been apprised of this restriction and who are themselves bound by nondisclosure obligations at least as restrictive as those set forth in this Section;
- (b) to use the Confidential Information of the Disclosing Party only for the purposes of performing its obligations under the Agreement or, in the case of the CPWA, to make use of the Services; and
- (c) to promptly notify the Disclosing Party in the event it becomes aware of any loss or disclosure of any of the Confidential Information of Disclosing Party.

6.2 If the Receiving Party becomes legally compelled to disclose any Confidential Information, the Receiving Party shall provide:

- (a) prompt written notice of such requirement so that the Disclosing Party may seek, at its sole cost and expense, a protective order or other remedy; and
- (b) reasonable assistance, at the Disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure.

If, after providing such notice and assistance as required herein, the Receiving Party remains required by law to disclose any Confidential Information, the Receiving Party shall disclose no more than that portion of the Confidential Information which, on the advice of the Receiving Party's legal counsel, the Receiving Party is legally required to disclose

**7. Limitation of liability.**

7.1 EXCEPT IN RELATION TO A BREACH OF SECTION 6, IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER OR TO ANY THIRD PARTY FOR ANY LOSS OF USE, REVENUE OR PROFIT OR LOSS OF DATA OR FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL OR PUNITIVE DAMAGES WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGE WAS FORESEEABLE AND WHETHER OR NOT SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

7.2 EXCEPT AS OTHERWISE PROVIDED IN SECTION 7.2, IN NO EVENT WILL EITHER PARTY'S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED ONE TIMES THE AGGREGATE AMOUNTS PAID OR PAYABLE TO SERVICE PROVIDER PURSUANT TO THIS AGREEMENT.

## **8 Governing Law.**

This Agreement and the legal relations between the Parties shall, in all respects, be governed by, and construed in accordance with, the laws of the State of Oklahoma, without regard to principles of conflicts of law.

## **9 Notices.**

Any notices, consents or other communications by or between the Parties required or permitted hereunder shall be in writing and shall be sufficiently given if hand delivered or sent by registered mail or certified mail, postage prepaid, by facsimile transmission with confirmed receipt or by courier or delivery service addressed or sent by facsimile transmission as follows:

To CPWA:  
The City of Clinton  
PO BOX 1177  
Attn: Public Works Director

To Consultant:  
Severn Trent Environmental Services, Inc.  
580 Virginia Drive, Fort Washington, PA 19034  
Attn: Senior Legal Counsel

Any Party may change such Party's address and/or facsimile number by giving notice of such change to the other Party in accordance with this Section 9. Any notice, consent or other communication given hereunder shall be deemed to have been given as of the date delivered; provided that a notice of change of address and/or facsimile number shall be deemed to have been given only when received.

## **10 Arbitration.**

In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or the breach thereof, the Parties shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both Parties. If they do not reach such solution within a period of sixty (60) days, then, upon notice by either Party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration in Oklahoma City, Oklahoma, or such other location as mutually agreed upon by the parties, through the auspices of the American Arbitration Association ("AAA") in accordance with the rules of arbitration promulgated by the AAA. The governing law for arbitration shall be the law of the State of Oklahoma. The award made by this arbitration body shall be final and binding on the Parties and may be enforced by any court or judicial authority having competent jurisdiction over the Party or its assets against whom the arbitration award is to be enforced. The Parties acknowledge that this Agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this Agreement. The prevailing Party shall be entitled to an award of reasonable attorney fees.

## **11 Entire Agreement.**

This Agreement constitutes the final, complete and exclusive expression of the understandings and agreements of the Parties relating to the subject matter hereof, and supersedes all prior agreements, understandings and negotiations, whether written or oral, between the Parties relating to such subject matter.

## **12 Amendments; Waivers.**

No amendment, modification, supplement, rescission, waiver or release of any provision of this Agreement shall be effective unless set forth in writing signed by the Party or Parties to be bound thereby.

**13 Invalidity.**

In the event any term or provision of this Agreement is determined by a court or arbitration panel having jurisdiction to be invalid, illegal or unenforceable, in whole or in part, for any reason, the invalid, illegal or unenforceable provision or part shall be considered separable from the remainder and such determination shall not impair the validity, legality or enforceability of the remainder of this Agreement. It is the intent of the Parties that, in such event, the applicable provision, including, without limitation, any provisions of Section 3 hereof shall be given the legal effect and application that is closest to the provision as originally written.

**14 No Third-party Beneficiaries.**

Save in respect of Section 6 under which a Disclosing Party may directly enforce its rights under this Agreement, this Agreement is solely for the benefit of the Parties, and nothing herein, express or implied, is intended to confer any rights on any other person or persons.

**15 Benefits and Binding Effect.**

This Agreement shall inure to the benefit of, and be binding upon, the respective Parties and their heirs, executors, administrators, personal representatives, successors and permitted assigns. The agreements of Consultant hereunder are personal in nature and may not be assigned, in whole or in part.

**16 Relationship of the parties.**

The relationship between the parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.

**17 Sub-contracting.**

The CPWA acknowledges and agrees that certain elements of the Services require the expertise of one or more of the Team Members. The Consultant shall however remain responsible to the CPWA for the proper provision of the Services, and the CPWA shall have no direct liability, financial or otherwise, for Team Members engaged by Consultant.

**18 Counterparts.**

This Agreement may be executed in one or more counterparts, and by different Parties on different counterparts, each of which shall be considered an original and all of which shall be considered one and the same agreement. One or more counterparts of this Agreement may be delivered by facsimile transmission with the intent that it or they shall constitute an original counterpart hereof.

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the day and year first set forth above.

**Clinton Public Works Authority**

**Severn Trent Environmental Services, Inc.**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_ Title: \_\_\_\_\_

Date: \_\_\_\_\_ Date: \_\_\_\_\_

**Schedule 1**

**The Services**

**DRAFT**

## Schedule 2

### The Fees



Item	Fee
Application Fee	\$100
Registration Fee	\$200
Annual Fee	\$150
Transfer Fee	\$100
Renewal Fee	\$100
License Fee	\$100
Exam Fee	\$100
Training Fee	\$100
Membership Fee	\$100
Subscription Fee	\$100
Publication Fee	\$100
Advertising Fee	\$100
Printing Fee	\$100
Postage Fee	\$100
Travel Fee	\$100
Accommodation Fee	\$100
Food Fee	\$100
Transportation Fee	\$100
Insurance Fee	\$100
Medical Fee	\$100
Legal Fee	\$100
Accounting Fee	\$100
Consulting Fee	\$100
Training Fee	\$100
Membership Fee	\$100
Subscription Fee	\$100
Publication Fee	\$100
Advertising Fee	\$100
Printing Fee	\$100
Postage Fee	\$100
Travel Fee	\$100
Accommodation Fee	\$100
Food Fee	\$100
Transportation Fee	\$100
Insurance Fee	\$100
Medical Fee	\$100
Legal Fee	\$100
Accounting Fee	\$100
Consulting Fee	\$100